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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY T. ALLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A04-0608-CR-420
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0108-CF-1011

May 21, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Timothy Allen ("Allen") pleaded guilty in Bartholomew Superior Court to Class A felony robbery. The trial court sentenced him to serve forty-five years. On appeal, he raises the following issues:

I. Whether the trial court's consideration of aggravating factors violated Blakely v. Washington;

II. Whether the trial court abused its discretion in considering the murder of the victim and Allen's alleged battery of a jail inmate as aggravating circumstances; and,

III. Whether the trial court abused its discretion in assigning minimal mitigating weight to Allen's age and guilty plea.

We affirm.

Facts and Procedural History

On August 9, 2001, Allen met Mario Sanchez ("Sanchez") at a Big Foot gas station. Sanchez told Allen that he knew where they could get some "bud," or marijuana. Allen had been drinking and smoking marijuana earlier that day. Allen and Sanchez got in the car with Laura McIntosh ("McIntosh"), and they asked her to drive them to an apartment complex to find Daniel Warren ("Warren"). Sanchez had told Allen that Warren sold good quality marijuana.

Sanchez and Allen went into the apartment where they found Warren, Nathan Carothers ("Carothers"), Jessica Olson, and another individual called "Brock." Sanchez and Allen followed Warren to a back room, and Warren showed them a big bag of marijuana. Sanchez appraised the bag and then threw it to Allen, who opened it and smelled the marijuana. Sanchez then pulled out a gun and told Warren that he was being robbed. He told Warren to lie down on the bed.

Once Sanchez pulled out the gun, Allen began to participate in the robbery as well. Tr. p. 34. Sanchez handed Allen the gun so he could rummage through Warren's pockets. While Allen held a gun to Warren's head, Sanchez took Warren's jewelry, watch, and money. Sanchez then took the gun back from Allen and ordered Warren to climb into the closet and start counting backwards. Allen left the apartment building and got in the car with McIntosh, leaving Sanchez behind. Then Allen heard a loud sound from inside the apartment.

Afterwards Allen met Sanchez at a Steak 'N Shake bathroom to collect his share of the marijuana from the robbery. Sanchez told Allen that he had shot Carothers, but Allen said he did not learn of Carothers's death until he read about it in the newspaper the next morning.

On August 14, 2001, the State charged Allen with felony murder and Class B felony robbery. On November 8, 2001, the State also charged Allen with Class A felony robbery. On March 13, 2003, Allen entered a plea of guilty to Class A felony robbery, and the State moved to dismiss the other charges as well as charges under two separate cause numbers. Allen's plea agreement was an "open plea" that gave the trial court discretion as to his sentence. Following a sentencing hearing, on May 21, 2003, the trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Allen to forty-five years, a fifteen-year enhancement. On July 10, 2006, Allen filed a petition for permission to file a belated notice of appeal, which was granted on July 25, 2006. Allen now appeals. Additional facts will be provided as necessary.

I. Blakely Claim

Allen first contends that his forty-five year sentence violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004), as the trial court listed a number of facts on which it relied to determine aggravating circumstances that were neither admitted by Allen nor found by a jury. The trial court found as aggravating circumstances the risk that Allen would commit another crime, the nature and circumstances of the crime, his prior criminal record, and his bad character. At sentencing, the trial court at length described the facts on which it had relied to support these aggravating circumstances. Allen contends that the trial court improperly relied on a New York charge and other uncharged crimes in concluding that Allen had a bad character and was at risk of committing another crime.

Blakely reiterated the Sixth Amendment rule announced in Apprendi v. New Jersey, 530 U.S. 466, (2000), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Blakely, 542 U.S. at 301. Our supreme court addressed the effect of the Blakely decision on Indiana's sentencing scheme in Smylie v. State, 823 N.E.2d 679 (Ind. 2005). In that case, the supreme court held that portions of Indiana's sentencing scheme as it then existed violated a defendant's Sixth Amendment right to a trial by jury.

In Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005), we concluded that Blakely does not apply retroactively to cases in which a direct appeal was not pending when Blakely was decided. See also Hull v. State, 839 N.E.2d 1250, 1256 (Ind.

Ct. App. 2005). In the case before us, Allen was sentenced on May 21, 2003. The Blakely decision was issued on June 24, 2004, and Allen did not file his belated notice of appeal until August 1, 2006. Thus, Allen's direct appeal was not pending at the time that Blakely was decided, and Allen is not entitled to now raise a Blakely challenge.[1]

Nevertheless, we note that at the sentencing hearing, Allen admitted to several facts that would support the trial court's conclusion that Allen had a bad character and was at risk of committing another crime. Allen admitted that he was young when he started smoking marijuana, and that he "wanted to smoke instead of be at home." Tr. p. 23. Allen also told the court that he quit school because he "wanted to smoke weed and drink and hang out." Id. Allen admitted that he "always hang[s] out with the wrong crowd." Id. at 43. He explained that "that's just the things that attract [him]." Id. at 45. Allen further admitted to having several petitions to revoke his probation for curfew violations when he was young and first started smoking marijuana. Id. at 23. He also stated that he was charged with another crime when he was fifteen or sixteen years old, and he agreed to move back to New York to have the case dismissed. Id. at 23-24.

From these admissions, the trial court could properly conclude that Allen's involvement in illegal drugs and his habit of hanging out with the wrong crowd have caused his previous run-ins with the law, demonstrating his bad character and indicating a risk that he would commit future crimes. Therefore, we find no error.

II. Aggravating Circumstances

[1] We acknowledge that in Gutermuth v. State, 848 N.E.2d 716, 727 (Ind. Ct. App. 2006), another panel disagreed with the conclusion that Blakely can only be applied to cases in which a direct appeal was pending at the time the case was decided. On August 24, 2006, our supreme court granted transfer in Gutermuth, and we await that decision.

Allen contends that the trial court abused its discretion in considering the murder of the victim and Allen's alleged battery of a jail inmate as aggravating circumstances. Allen maintains that because both of these charges were dismissed as part of the plea agreement, the trial court could not consider the dismissed charges as aggravating circumstances.

Generally, "sentencing determinations are within the trial court's discretion." Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005) (citations omitted). When our court is faced with a challenge to an enhanced sentence, we must "determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances." Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied. The trial court is responsible for determining the appropriate weight to give aggravating and mitigating circumstances. Powell v. State, 751 N.E.2d 311, 315 (Ind. Ct. App. 2001) (citations omitted).

At the sentencing hearing, Allen admitted that the robbery resulted in Carothers being shot and killed. Tr. p. 12. In fact, he stated he believed the murder would not have occurred if he had not been involved in the robbery. Id. at 39. However, on appeal he maintains that the trial court could not consider Carothers's death as an aggravating circumstance because the State dismissed the murder charge as part of the plea agreement.

Our supreme court refuted this line of reasoning in the factually similar case of Lang v. State, 461 N.E.2d 1110 (Ind. 1984). In Lang, the defendant was also charged with Class A felony robbery resulting in serious bodily injury to the victim. The State decided to dismiss a charge for murder, but the trial court enhanced the defendant's sentence due to the seriousness of the injury, i.e. death. Our supreme court held that "[t]he serious nature of the injuries to the victim . . . was one of the specific facts that the court could consider as an aggravating circumstance." Id. at 1113. Therefore, while the trial court was prohibited from imposing the maximum sentence for robbery resulting in serious bodily injury in an effort to compensate for the State's decision to dismiss the murder charge, the trial court did not abuse its discretion in assigning aggravating weight to the extent that the victim's injury went beyond that required to constitute "serious bodily injury." Id.

Here, Allen pleaded guilty to armed robbery resulting in serious bodily injury to someone other than Allen. Indiana Code section 35-41-1-25 (2004) defines serious bodily injury as a "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus." A trial court may not use "a factor constituting a material element of an offense as an aggravating circumstance." Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). In this instance, death of the victim was not an element of the offense. The statute only requires "serious bodily injury." Death is certainly a much more injurious consequence than "serious bodily injury." Furthermore, the trial court

did not sentence Allen to the maximum possible sentence for a Class A felony, and consequently we cannot conclude that the trial court was trying to compensate for the State's decision to dismiss the murder charge. Therefore, the trial court did not abuse its discretion in considering the death of the victim as an aggravating circumstance.

Allen next contends that the trial court improperly considered the facts surrounding the battery of a jail inmate as an aggravating factor. As part of the plea agreement, the State agreed to dismiss this battery charge. The State maintains that the trial court appropriately considered this dismissed charge as part of the nature and circumstances of the crime or of Allen's character. Br. of Appellee at 7. We disagree.

The battery of the jail inmate allegedly occurred at a separate time and location than the robbery of the residence. The information for the battery was also filed under a separate cause number than the robbery charge. Therefore, "[t]his circumstance actually relates to the 'nature and circumstances' of an entirely separate crime, which was never established. Thus, we do not believe that the sentencing court was justified in relying upon this to enhance the sentence." Stone v. State, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000) (citing Carlson v. State, 716 N.E.2d 469, 472 (Ind. Ct. App. 1999) (sentencing court should not have considered evidence of the large amount of cocaine found in defendant's possession after charge dismissed)).

However, "a single aggravating circumstance is adequate to justify a sentence enhancement." Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). Standing alone, either a defendant's prior criminal record or the nature and circumstances of the crime is sufficient to support the enhancement of a sentence. Buchanan v. State, 699 N.E.2d

655, 657 (Ind. 1998). Here, not only did the trial court find as aggravating factors both Allen's criminal history and the serious nature and circumstances of the crime, but the trial court also listed as aggravators that there was a risk Allen would commit another crime and Allen's character. Based on these proper aggravators, we are confident that the trial court would have imposed the same sentence without considering the alleged battery of the inmate, and therefore decline to reverse and remand for resentencing. See McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

II. Mitigating Circumstances

Allen maintains that the trial court abused its discretion in not assigning significant mitigating weight to his age and his guilty plea. The trial court has discretion in evaluating mitigating factors and must only include those it deems significant. Bailey v. State, 763 N.E.2d 998, 1004 (Ind. 2002). A trial court is not obligated to weigh or credit mitigating factors as a defendant requests. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002).

Allen was eighteen years old at the time of the offense. Although the trial court considered his youth as a minimal mitigating circumstance, Allen contends that it abused its discretion in not assigning significant mitigating weight to this factor. Age is neither a statutory nor a per se mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). At age eighteen, Allen is beyond the age at which the law commands special treatment by virtue of youth. Id. As our supreme court noted in Sensback, "[t]here are cunning children and there are naïve adults." Id. "In other words, focusing on chronological age, while often a shorthand for measuring culpability, is frequently not the

end of the inquiry for people in their teens and early twenties." Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001) (citation omitted). There are relatively young offenders who appear hardened and purposeful. Id.

Here, the trial court heard significant testimony from Officer Thomas Watts regarding the reports his office had received from citizens claiming that Allen had held them up at gunpoint. Tr. pp. 60-75 Officer Randy Aspen testified that Warren described Allen as having been the person who primarily held the gun to his head during the robbery, and that in fact Allen had placed the gun in Warren's mouth and demanded that Warren bite down on the barrel. Id. at 81. Allen himself admitted that he had been involved in drugs and alcohol from an early age and had quit school to drink and smoke marijuana. Id. at 23. As a juvenile, Allen was adjudicated a runaway in 1998 and placed on probation twice. Appellant's App. pp. 38-40. There were several petitions to revoke Allen's probation due in part to Allen's continued drug abuse, and Allen admitted to at least one probation violation. Id. At the time that Allen committed this crime, there was also an outstanding warrant for his arrest in New York on a charge of robbery. Considering Allen's criminal history, his admitted drug abuse for the past several years, and the seriousness of the crime involved, we cannot conclude that the trial court abused its discretion when it did not assign significant mitigating weight to Allen's age.

Lastly, Allen contends that the trial court abused its discretion in failing to assign significant weight to his guilty plea. The significance of a guilty plea as a mitigating circumstance will vary from case to case. Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). Here, Allen cannot demonstrate that his guilty plea is entitled to significant

mitigating weight as he received a substantial benefit from his plea agreement in that the State dismissed two extremely serious counts in this cause, one for murder and one for Class B felony armed robbery. The State also agreed to dismiss charges of illegal consumption and possession of marijuana under another cause number as well as a charge of battery under yet a third cause number. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied, (holding that a defendant's guilty plea is not worthy of significant mitigation where the defendant receives substantial benefit).

Furthermore, we note that Allen was charged on August 14, 2001, but did not plead guilty until March 13, 2003. During this delay, the State was involved in substantial discovery and preparations for the scheduled jury trial, which was continued numerous times pursuant to motions filed by Allen. Because of this long delay, Allen did not extend a substantial benefit to the State by pleading guilty. Francis, 817 N.E.2d at 238 n.3 (citing Sensback, 720 N.E.2d at 1165, 1165 n.4). Consequently, the trial court did not abuse its discretion in refusing to assign significant mitigating weight to Allen's guilty plea.

Conclusion

The trial court's consideration of aggravating factors did not violate Allen's Blakely rights. Any reliance on Allen's alleged battery of a jail inmate as an aggravating factor was harmless error. The trial court did not abuse its discretion in assigning aggravating weight to the serious nature and circumstance of this crime, which resulted in death, nor did the trial court abuse its discretion when it did not assign significant mitigating weight to Allen's age and guilty plea.

Affirmed.

NAJAM, J., concurs.

MAY, J., concurs in result.